

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1562

DRESSER INDUSTRIES, INC.,
Petitioner

v.

EMRA JOSEPH BONHAM,
Respondent

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Respondent, Emra Joseph Bonham, respectfully prays
that Petitioner's Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The opinions below are appended to the Petitioner's
Petition as Appendix A and Appendix B.

JURISDICTION

Jurisdiction of this Honorable Court is not contested.

STATUTE INVOLVED

The Statute involved is the Age Discrimination in
Employment Act, 29 U.S.C. §621 et seq. and the pertinent
portion of the Statute is set out in Petitioner's Petition.

QUESTION PRESENTED

Is there a conflict within the Circuits in the interpreta-
tion and application of the Notice of Intent to Sue

requirement of the Act (29 U.S.C. §621(d)) which has not been, but should be, settled by this Honorable Court.

STATEMENT OF THE CASE

Respondent Bonham filed an action on August 20, 1976 in the U.S. District Court for the Western District of Pennsylvania, alleging that the termination of his employment with Harbison-Walker Refractories, Division of Dresser Industries, Inc. violated the Age Discrimination Employment Act, 29 U.S.C. §621, et seq.

Respondent Bonham was 46 years of age on October 31, 1975 when he was advised by his superiors, employees of the Petitioner Dresser, that he would be terminated on December 31, 1975.

During the period between October 31, 1975 and December 31, 1975, Respondent Bonham continued to receive every indicia of employment including normal pay on normal schedule and maintenance of all fringe benefits. He believed himself to be an employee of Dresser during that period and did not believe that his termination was final until December 31, 1975.

Bonham endeavored after December 31, through correspondence with Dresser's President, to reverse his termination and obtain transfer employment within the Dresser organization.

The record reveals that on October 31 (and on December 31) Bonham was unaware of the ADEA and he has alleged no notice of the Act was given as required.

Respondent's statutory notices to the Federal and State authorities were given on June 16, 1976, within 180 days of December 31, 1975 and 229 days after October 31, 1975.

Petitioner Dresser moved to dismiss Count One of Bonham's Complaint alleging a lack of subject matter

jurisdiction because of failure to file timely notice with the Federal and State authorities under the Act's notice of intent to sue requirements.

The District Court determined the "illegal act" occurred on October 31, 1975 and granted Dresser's Motion to Dismiss, treating it as a Motion for Summary Judgment. Respondent appealed to the United States Circuit Court of Appeals for the Third Circuit which Court reversed the granting of Summary Judgment holding that the 180 day notice of intent to sue requirement was not strictly jurisdictional but was subject to tolling or other equitable modifications. The case was remanded to the District Court for determination of facts pertinent to the question of equitable modification of the 180 day notice requirement. Petitioner filed a Petition for Rehearing which was denied. The instant Petition to this Honorable Court then followed.

ARGUMENT IN OPPOSITION TO GRANTING THE REQUESTED WRIT

1. The Decision Below Is in Harmony with the Prior Decisions of the Third Circuit Court of Appeals and Is in Harmony with Decisions of Other Circuits on the Same Issue.

The Third Circuit Court of Appeals had, prior to its decision in this case, reviewed District Court decisions in three cases dealing with the notice requirements. In *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977) and *Goger v. H. K. Porter Co., Inc.*, 492 F.2d 13 (3rd Cir. 1974), the Third Circuit, while using the term "jurisdictional" with reference to the notice requirement, in fact examined the equitable considerations and determined that procedural fault in complying with the notice requirement did not foreclose suit. In *McGarvey v. Merck and Co., Inc.*, 493 F.2d 1401 (3rd Cir.) the court vacated, without published opinion, the New Jersey District Court judgment

*Argument in Opposition
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(359 F. Supp. 525 (D.N.J. 1973)) applying the strict jurisdictional measure. The opinion in the instant case is, therefore, contrary to Petitioner's suggestion, totally consonant with all of the Third Circuit's prior holdings on the "jurisdictional" nature of the notice requirement.

In addition, the Court of Appeals decision in the instant case is, contrary to the suggestion of the Petitioner, in harmony with each of the other Circuits ruling on this issue.

Petitioner has counseled this Court that the Fifth, Sixth and Eighth Circuits, "every... Circuit ruling on the issue", have found timely compliance with the notice provisions to be a "jurisdictional" prerequisite to the maintenance of a private action. Your Respondent suggests that Petitioner has misread those cases.

A close reading of those opinions from the Fifth Circuit cited by the Petitioner, when read with that Circuit's opinion in *Charlier v. S. C. Johnson & Sons, Inc.*, 556 F.2d 761 (5th Cir. 1977) clearly shows that the Fifth Circuit has approached the problem in a manner identical to the Third Circuit in the instant case.

The Sixth Circuit has acknowledged that in those decisions where the Court used the term "jurisdictional", it was used

"in the loose sense that §626 (d)'s requirements are a condition precedent to suit in Federal Court and not in the strict sense that non-compliance deprives the District Court of power to hear the case." *Gabriele v. Chrysler Corporation*, 17 F.E.P. Cases 200 at Pg. 204, footnote 15 (6th Cir. 1978).

A similar finding of the non "jurisdictional" nature of the notice requirement may be fairly read in *Evans v. Oscar Mayer & Company*, 17 F.E.P. Cases 221 (8th Cir. 1978).

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The unanimity of the Circuits on this question should properly lead this Court to deny the requested Writ of Certiorari.

**2. The Present State of the Law and Legislative History
Support the Decision Below in the Third Circuit Court of
Appeals and Decisions Cited from the Other Circuits.**

The Age Discrimination Employment Act was amended by Public Law 95-256, approved April 6, 1978.

In the Conference Report published to accompany H.R. 5383, the Conferees agreed that the "charge" (notice of intent to sue in the original Act) is

"not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. See, e.g., *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976) affirmed by an evenly divided court, 98 S.Ct. 600 (1977); *Bonham v. Dresser Industries, Inc.*, 16 F.E.P. Cases 510 (3rd Cir. 1977); *Charlier v. S. C. Johnson & Sons, Inc.*, 556 F.2d 761 (5th Cir. 1977)."

Conference Report No. 95-950 to accompany H.R. 5383 (March 14, 1978) Page 12.

It is thus abundantly clear that Congress endorses the rationale of the Third Circuit Court of Appeals and each of the other Circuits on the notice question.

While the amendments to the Act are prospective, by the terms of the Act, the Conference Committee's endorsement of the opinion below is clearly retroactive. The remedial and humanitarian nature of the ADEA would warrant retroactive application of the amendments under the rationale of this Court in *Bradley v. Richmond*, 416 U.S. 696 and *Court v. Ashe*, 422 U.S. 66.

CONCLUSION

For all of the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I, JAMES R. DUFFY, ESQUIRE, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief in Opposition to Petition for Writ of Certiorari in accordance with Rule 33 (1) of the Rules of the Supreme Court of the United States, upon the Petitioner, by mailing three copies thereof to Donald E. Seymour, Esq., 1500 Oliver Building, Pittsburgh, PA 15222, Attorney for the Petitioner, by first class mail, postage prepaid, this 6th day of July, 1978.

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